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FEDERAL TRADE COMMISSION

[File No. 111 0170]

Fresenius Medical Care AG & Co. KGaA; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before March 29, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Fresenius Liberty, File No. 111 0170" on your comment, and file your comment online at https://ftcpublic.commentworks.com/ftc/freseniuslibertyconsent, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Lisa De Marchi Sleigh (202-326-2535), FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for February 28, 2012), on the World Wide Web, at http://www.ftc.gov/os/actions.shtm. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 29, 2012. Write "Fresenius Liberty, File No. 111 0170" on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/freseniuslibertyconsent by following the instructions on the web-based form. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

If you file your comment on paper, write "Fresenius Liberty, File No. 111 0170" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, NW,

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 29, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at http://www.ftc.gov/ftc/privacy.htm.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Fresenius Medical Care AG & Co. KGaA ("Fresenius"). The purpose of the Consent Agreement is to remedy the anticompetitive effects resulting from Fresenius's purchase of Liberty Dialysis Holdings, Inc. ("Liberty"). Under the terms of the Consent Agreement, Fresenius is required to divest 60 dialysis clinics and terminate one management contract in 43 geographic markets across the United States.

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement or make it final.

Pursuant to an agreement dated August 1, 2011, Fresenius proposes to acquire Liberty for approximately $2.1 billion. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition in 43 markets for the provision of outpatient dialysis services.

The Parties

Headquartered in Bad Homburg, Germany, Fresenius is the largest provider of outpatient dialysis services in the United States. Fresenius operates more than 1,800 outpatient dialysis clinics in all 50 states and the District of Columbia treating approximately 131,000 patients. In 2010, Fresenius's revenues were approximately $8 billion.

Liberty, headquartered in Mercer Island, Washington, is a privately held company and the third-largest provider of outpatient dialysis services in the United States. Liberty operates 260 dialysis centers, providing dialysis services to approximately 19,000 patients in 32 states and the District of Columbia.

Outpatient Dialysis Services

Outpatient dialysis services is the relevant product market in which to assess the effects of the proposed transaction. For patients suffering from End Stage Renal Disease ("ESRD"), dialysis treatments are a life-sustaining therapy that replaces the function of the kidneys by removing toxins and excess fluid from the blood. Most ESRD patients receive dialysis treatment three times per week in sessions lasting between three and five hours. Kidney transplantation is the only alternative to dialysis for ESRD patients. However, the wait-time for donor kidneys – during which ESRD patients must receive dialysis treatments – can exceed five years. Additionally, many ESRD patients are not viable transplant candidates. As a result, ESRD patients have no alternative to dialysis treatments. ESRD patients who are not hospitalized must obtain dialysis treatments from outpatient dialysis clinics.

Dialysis services are provided in local geographic markets limited by the distance ESRD patients are able to travel to receive treatments. ESRD patients are often very ill and suffer from multiple health problems, making travel further than 30 miles or 30 minutes very difficult. As a result, competition among dialysis clinics occurs at a local level, corresponding to metropolitan areas or subsets thereof. The exact contours of each market vary depending on traffic patterns, local geography, and the patient's proximity to the nearest center.

Entry into the outpatient dialysis services markets identified in the Commission's Complaint is not likely to occur in a timely manner at a level sufficient to deter or counteract the likely anticompetitive effects of the proposed transaction. The primary barrier to entry is the difficulty associated with locating nephrologists with established patient pools to serve as medical directors. By law, each dialysis clinic must have a nephrologist medical director. As a practical matter, medical directors are also essential to the success of a clinic because they are the primary source of referrals. The lack of available nephrologists with an established referral stream is a significant barrier to entry into each of the relevant markets. Beyond that, the attractiveness of entry is diminished where certain attributes, including a rapidly growing ESRD population, a favorable regulatory environment, average or below nursing and labor costs, and a low penetration of managed care are not present, as is the case in many of the geographic markets identified in the Commission's complaint.

Each of the geographic markets identified in the Complaint is highly concentrated. The proposed acquisition represents a merger-to-monopoly in 17 markets and would cause the number of providers to drop from three to two in 24 other markets. Additionally, in the remaining two markets identified in the Complaint, concentration is already very high and would increase significantly. In these two markets, the fourth market participant is small and does not meaningfully impact competition. Further, the evidence shows that health insurance companies and other private payors who pay for dialysis services used by their members benefit from direct competition between Fresenius and Liberty when negotiating rates charged by dialysis providers. The high post-acquisition concentration levels, along with the elimination of Fresenius's and Liberty's head-to-head competition in these markets suggest the proposed combination likely would result in higher prices and diminished service and quality for outpatient dialysis services in many geographic markets.

The Consent Agreement

The Consent Agreement remedies the proposed acquisition's anticompetitive effects in 43 markets where both Fresenius and Liberty operate dialysis clinics by requiring Fresenius to divest 54 outpatient dialysis clinics to Dialysis Newco, Inc. (d/b/a DSI Renal) ("New DSI"); divest one outpatient dialysis clinic to Alaska Investment Partners LLC ("AIP"), and five outpatient dialysis clinics to Dallas Renal Group ("DRG"). The Consent Agreement also requires Fresenius to terminate one management services agreement pursuant to which it manages an outpatient dialysis clinic on behalf of a third-party owner. As with the divestitures, termination of this management services agreement will ensure that this clinic remains a viable independent competitor.

As part of these divestitures, Fresenius is required to obtain the agreement of the medical directors affiliated with the divested clinics to continue providing physician services after the transfer of ownership to the buyers. Similarly, the Consent Agreement requires Fresenius to obtain the consent of all lessors necessary to assign the leases for the real property associated with the divested clinics to the buyers. These provisions ensure that each buyer will have the assets necessary to operate the divested clinics in a competitive manner.

The Consent Agreement contains several additional provisions designed to ensure that the divestitures are successful. First, the Consent Agreement provides each buyer with the opportunity to interview and hire employees affiliated with the divested clinics and prevents Fresenius from offering these employees incentives to decline any buyer's offer of employment. This will ensure that each buyer has access to patient care and supervisory staff who are familiar with the clinics' patients and the local physicians. Second, the Consent Agreement prevents Fresenius from contracting with the medical directors (or their practice groups) affiliated with the divested clinics for three years. This provides each buyer with sufficient time to build goodwill and a working relationship with its medical directors before Fresenius can attempt to capitalize on its prior relationships in soliciting their services. Third, to ensure continuity of patient care and records as each buyer implements its quality care, billing, and supply systems, the Consent Agreement allows Fresenius to provide transition services for a period of 12 months. Firewalls and confidentiality agreements have been established to ensure that competitively sensitive information is not exchanged. Fourth, the Consent Agreement requires Fresenius to provide each buyer with a license to use Fresenius's policies, procedures, and medical protocols, as well as the option to obtain Fresenius's medical protocols, which will further enhance the buyer's ability to continue to care for patients in the clinics that will be divested. Finally, the Consent Agreement requires Fresenius to provide notice to the Commission prior to any acquisitions of dialysis clinics in the markets addressed by the Consent Agreement in order to ensure that subsequent acquisitions do not adversely impact competition in the markets at issue or undermine the remedial goals of the proposed order.

The Commission is satisfied that New DSI is a qualified acquirer of the majority of the divested assets. New DSI is currently a significant operator of dialysis clinics, having been formed to acquire the divested assets resulting from the 2011 DaVita/DSI investigation. The company was formed by Frazier Healthcare, a firm with a dedicated focus on healthcare, and New Enterprise Associates, the world's largest venture capital firm with over $10.5 billion under management.

Similarly, the Commission is satisfied that AIP is a qualified acquirer of divested assets in Alaska. AIP is a limited liability company wholly-owned by Dr. Mary Dittrich, the divested clinic's medical director, and Dr. William Dittrich. AIP has received financial support from Crystal Cascades LLC, an investment fund that manages $100 million.

Finally, the Commission is satisfied that DRG is a qualified acquirer of divested assets in the Dallas, Texas area. DRG is an integrated care provider in Dallas, Texas with nine nephrologists on staff and whose nephrologists currently serve as the medical directors of these divested assets. DRG holds the majority ownership interest in the five Liberty clinics in Dallas that would be divested, and has a strong reputation in the Dallas area.

The Commission has appointed Richard Shermer of R. Shermer & Co. as an Interim Monitor to oversee the transition service agreements, and the implementation of, and compliance with, the Consent Agreement. Mr. Shermer assists client companies undergoing ownership transitions, and has specific experience with transitions of outpatient dialysis clinics.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Order to Maintain Assets, or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark

Secretary.

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